UNITED PRIME INSURANCE (M) SDN. BHD.

v.

HONG LEE TRADING CO.

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[CIVIL APPEAL NO. R1-12-175-91]
27 APRIL 1993

INSURANCE LAW: Claim on a burglary policy - Insurance company disputing liability - Whether theft and loss occassioned by it was within the terms of the policy.

The plaintiff took out a burglary policy on their premises with the defendant. During the currency of the policy the plaintiff's premises was burgled as a result of which it suffered loss. On the day in question a representative of the plaintiff was closing the premises when a male Chinese came intimating his desire to purchase something. The plaintiff's representative let him into the premises and showed him a catalogue when another male Chinese came in, took out a knife and threatened him. His hands and legs were tied and the two male Chinese took away the plaintiff's goods valued at RM31,249.36. Upon the defendant's failure to pay under the policy, the plaintiff sued the defendant.

The defendant applied to strike out the plaintiff's claim on the grounds that their liability only arose if the theft was consequent upon actual forcible and violent entry and since it was not disputed that the burglars were let into the shop by the representative of the plaintiff, the plaintiff had no claim against them.

The plaintiff contended that although the entry was at first peaceful, once violence was used the entry became a violent entry. Upon the dismissal of the defendant's application, the defendant appealed.

Held:

[1] The words of the policy taken together contemplate the existence of an entry by real violence and not a mere technical entry by violence. The policy was directed to securing the assured against the consequences of an entry effected by real "violence" as the word is commonly understood, in contradistinction to an entry effected by stealth without violence.

[2] Actual force or violence must be used to gain entry into the premises if the entry is to come within the terms of the policy. Any force or violence used after gaining entry is totally irrelevant.

[3] The first burglar was let into the premises by the representative of the plaintiff while the second burglar just walked into the premises. Not the slightest force or violence was used. The plaintiff's claim did not come within the terms of the policy and the plaintiff had no valid claim against the defendant.

[Appeal allowed with costs. Plaintiff's claim ordered to be struck off].

Cases referred to:

In re George and the Goldsmiths and General Burglary Insurance Association Limited [1899] 1 QB 595 ***(foll)***

In re An Arbitration between Calf and The Sun Insurance Office [1920] 2 KB 366 ***(refd)***

Legislation referred to:

Subordinate Courts Rules 1980, O. 14 r. 21

For the appellant - R. Zechariah; M/s. Anad & Associates

For the respondent - V. Nadarajan; M/s. Nadarajan Bhag Sulaiman & Co.

JUDGMENT

Wan Adnan Bin Ismail J:

This is an appeal against the decision of the learned Sessions Court Judge dismissing the appellant's/defendant's application to strike out the respondent's/plaintiff's claim under O. 14 r. 21 of the Subordinate Courts Rules.

Under a Burglary Policy No. WA 00541 dated 29 July 1989 the defendant had agreed to pay or make good to the plaintiff any loss suffered as a result of thefts in the plaintiff's premises No. 403 Ground Floor, Jalan Puchong, Setapak Kuala Lumpur. During the currency of the said policy a theft occurred in the plaintiff's said premises on 13 June 1990 and the plaintiff suffered a loss of RM31,249.36.

The facts are not in dispute. What happened at the material time was narrated by the representative of the plaintiff in his police report No. 2879/90 lodged at 7.50 p.m. on 13 June 1990. In the report he said:

> Pada jam 6.00 p.m. 13 June 1990 semasa saya sedang hendak menutup kedai Hardware & Machinery Hong Lee Trading Co. No: 403,

Ground Floor, Jalan Pahang, Setapak, Kuala Lumpur kerana selesai menjalankan perniagaan tiba-tiba datang seorang pemuda cina hendak membeli barang dan saya bawa pemuda cina tersebut masuk ke dalam kedai saya sambil menunjukkan catalogue kepada beliau dalam hal ini masuk seorang lagi kawannya yang mana beliau mengeluarkan pisau dan mengacukannya kepada perut saya sambil memberitahu supaya saya jangan buat bising kerana ini rompakan katanya, beliau terus mengikat tangan dan kaki saya dengan dawai yang sedia beliau bawa serta menutup mata saya dengan plastic tape dan memberitahu saya supaya duduk diam-diam yang mana beliau telah mengambil wang sebanyak RM1,300, Kad ETC Hongkong & Shanghai Bank serta lesen Pengangkutan barang-barang saya. T/Mati lesen tidak ingat, No. Siri lesen tidak ingat yang dikeluarkan di JPJ, P/Jaya, Selangor dari dalam poket seluar saya, lepas itu beliau terus keluar dari kedai saya dengan membawa beberapa buah Bosch Power Tools yang berjumlah lebih RM30,000 bersama-sama ini beliau juga telah melarikan M/Van Nissan C20 No. WBL 2B84, warna grey. Kerugian lebih kurang RM55,000, lepas itu saya dapat melepaskan diri dan terus menghubungi kawan saya. Sekian aduan saya.

It was the contention of the defendant that the liability of the defendant under the said policy would only arise if the theft was "consequent upon actual forcible and violent entry" upon the plaintiff's said premises and since the entry on the day in question was not such an entry the plaintiff had no claim against the defendant.

The said policy states -

This Policy Witnesseth that if at any time during the period of insurance stated in the Schedule hereto or during any further period for which the company may accept payment for the renewal of this policy -

A. The property insured or any part thereof described and included in the Schedule hereto whilst contained in the premises described in the said Schedule shall be lost -

(1) By **theft consequent upon actual forcible and violent entry upon the said premises** or committed by any person or persons (other than employees feloniously concealed thereon, or

(2) ...

B. ...

The Company Will Pay Or Make Good To The Insured

(a) Such loss to the extent of the market value at time of the loss.

(emphasis is added).

In *In re George and the Goldsmiths and General Burglary Insurance Association, Ltd.* [1899] 1 QB 595 a policy of insurance on stock-in-trade recited that the assured was desirous of effecting an insurance "against loss or damage by burglary and housebreaking as hereinafter defined" and the risk insured against was expressed to be loss of the property insured "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." The insured property was in a shop the front door of which was shut, but not locked or bolted, and access to the shop could be obtained by turning the handle of the door. During the temporary absence of a servant of the assured, some person opened the front door, entered the shop, and, breaking open a locked-up compartment or show-case within, which formed a portion of the shop, stole therefrom part of the insured property.

Lord Russell of Killowen CJ in his judgment said:

The question is whether the theft so committed was one for the consequences of which the appellants are liable under the policy ... The question simply is what is the true construction of the contract into which the parties have entered? In order to decide that question, we must endeavour to ascertain the meaning of the parties by the application of the ordinary canons of construction to the language which they have used .... Therefore it is not burglary and housebreaking as defined by the criminal law which is the subject-matter of the insurance, but burglary and housebreaking as the parties have defined them in their contract ... Taking the language of the policy, namely, that the assured is to be protected against loss "by theft following upon actual forcible and violent entry upon the premises," apart from technical considerations, could any one, as a matter of good sense, and, applying its ordinary meaning to ordinary language, suppose that an entry which is effected by turning the handle of the door and walking into the shop is an "actual forcible and violent entry" within the meaning of the policy? It appears to me that such a suggestion is repugnant to good sense .... It seems to me that the words taken together contemplate the existence of, not a mere technical entry by

> violence, but an entry by real violence ... I conceive that the policy was directed to securing the assured against the consequences of an entry effected by real "violence," as the word is commonly understood, in contradistinction to an entry effected by stealth without violence as I think the entry in this case was effected.

In the present case, on the day in question Lin Khim Wha the representative of the plaintiff was closing the shop at about 6.00 p.m. when a male Chinese came intimating his desire to purchase something. He let the male Chinese into the shop and showed him a catalogue. Then another male Chinese came in, took out a knife and threatened him. His hands and legs were then tied. The two male Chinese took away goods belonging to the plaintiff.

I agree with the principles enunciated in the *re George* case. The entry must be by real violence. The first male Chinese was let into the shop by the representative of the plaintiff while the second male Chinese just walked into the shop. Not the slightest force or violence was used. They did not even have to turn the handle of the door to get into the shop. Any suggestion that they used violence to enter is (to use the words of Lord Russell CJ), "repugnant to good sense."

But once the two male Chinese were inside the shop some violence was used. Counsel for the plaintiff contended that though the entry was at first peaceful but once violence was used the entry became a violent entry.

A somewhat similar proposition was also put to the Court in the *re George* case. Lord Russell CJ said:

> It is nevertheless argued that what followed afterwards constituted such an entry. What took place afterwards was this. The thief ... proceeded to prise off an iron plate to which a locked padlock was attached securing an inclosure bounded by glass which constituted what would be called the shop front or show-board of the shop, and so got possession of a quantity of jewellery with which he made off. The question is whether what he so did can be said to be an entry upon the premises within the meaning of the policy. In my judgment it cannot ... The insurance purports to be an insurance of property on the premises No. 78, Strand, and the entry spoken of by the policy is an entry upon the premises in which the property is situated.

A.L. Smith LJ in a separate judgment in the same case said:

> The question is : Is this act covered by the words of the policy, "theft following upon actual forcible and violent entry upon the premises wherein the same" (the property) "is herein stated to be situate"? It is argued that the glass show-case was forcibly and violently entered, and that the show-case constituted "the premises" upon which the forcible and violent entry was to be made so as to create a liability in the company. But I think it is clearly not so. It is force and violence from without, and not from within, the premises which is covered by the policy.

In the present case the insured premises was No. 403 Ground Floor, Jalan Pahang, Setapak, Kuala Lumpur. In my view the nature of the entry into the premises is what is important. Actual force and violence must be used to gain entry into the premises if the entry is to come within the terms of the policy. Any force or violence used after gaining entry is totally irrelevant.

I had also considered the case of *In re An Arbitration between Calf and The Sun Insurance Office* [1920] 2 KB 366

The facts in the present case clearly show that the plaintiff's claim cannot come within the terms of the policy and consequently the plaintiff has no claim against the defendant. I therefore allowed the appeal with costs and ordered that the plaintiff's claim be struck off.